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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER GUTIERREZ,

Defendant and Appellant.

2d Crim. No. B205940
(Super. Ct. No. 2006016714)
(Ventura County)

Peter Gutierrez appeals his conviction, by guilty plea, of first degree burglary (Pen. Code, § 459),¹ two counts of second degree burglary of a vehicle (§ 459), forgery (§ 470, subd. (a)), possession of a controlled substance with a firearm (Health & Saf. Code, § 11370.1, subd. (a)), two counts of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and two counts of receiving stolen property. (§ 496, subd. (a).) Appellant further admitted that he was released on bail when he committed one of the possession offenses and the receiving stolen property offenses. (§ 12022.1, subd. (b).)

At the sentencing hearing, appellant's counsel requested a three-week continuance because appellant wanted to move to withdraw his plea and counsel needed to investigate whether any grounds existed for that motion. The trial court

¹ All statutory references are to the Penal Code unless otherwise stated.

denied the request for a continuance. Consistent with the parties' stipulation, the trial court sentenced appellant to 13 years in state prison. It later granted appellant a certificate of probable cause to permit this appeal.

Appellant contends the trial court abused its discretion when it denied the continuance because that ruling deprived him of his right to bring a motion to withdraw his guilty plea. We affirm.

Appellant entered his guilty plea on November 19, 2007. During the same hearing, and at appellant's request, his sentencing was scheduled for January 8, 2008. On January 8, appellant's counsel told the trial court that appellant, "informed me today that he wants to have [his case] considered for a motion to withdraw." The trial court asked counsel when he had learned of appellant's request. Counsel responded, "Well, actually, I got a call from someone else. He told me about it today." Counsel did not inform the trial court earlier because, "I didn't know whether there was actually going to be a motion, your Honor, until I talked to him. I was in trial when I got the call." The trial court denied the request for a continuance without further argument, stating that, "I have prepared for the sentencing. I spent considerable time this morning." Defense counsel waived arraignment for judgment, agreed there was no legal cause why judgment should not be pronounced and submitted the matter on the parties' stipulated sentence of 13 years.

"The granting or denial of a motion for continuance rests within the sound discretion of the trial court. [Citation.] That discretion, of course, must be exercised in conformity with the applicable law. A continuance may be granted only on the moving party's showing of good cause. [Citation.] Such a showing requires, inter alia, a demonstration that both the party and counsel have used due diligence in their preparations." (*People v. Mickey* (1991) 54 Cal.3d 612, 660; see also *People v. Michaels* (2002) 28 Cal.4th 486, 525.) We will not disturb the trial court's ruling absent a clear showing that it acted in an arbitrary, capricious or whimsical manner,

and that its ruling was prejudicial to appellant. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840; *People v. Jacobs* (2007) 156 Cal.App.4th 728, 735-736.)

Appellant did not demonstrate to the trial court that good cause existed for the continuance, or that he and his counsel acted with due diligence to obtain it. (§ 1050, subd. (e).) Almost two months elapsed between appellant's guilty plea and his sentencing hearing. Appellant did not use that time to inform his counsel of his desire to withdraw his plea. No explanation has ever been offered for that delay. Nor did counsel offer any explanation of appellant's factual or legal basis for seeking to withdrawing his plea. This case is therefore distinguishable from *People v. Eastman* (2007) 146 Cal.App.4th 688, in which the defendant "claimed his motion to withdraw was based on inadequate representation by his appointed counsel and stated facts that could constitute good cause to withdraw his plea." (*Id.* at p. 698.)

We recognize that appellant has a right to move to withdraw his plea, even against the advice of counsel. (*People v. Osorio* (1987) 194 Cal.App.3d 183, 188-189.) Appellant nevertheless has an obligation to act diligently in exercising that right. Requesting a continuance on the day of the sentencing hearing, without offering any explanation for the failure to request it earlier and without stating any factual or legal basis for the planned motion to withdraw, is not due diligence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037; *People v. Grant* (1988) 45 Cal.3d 829, 844.)

Respondent notes that, at the sentencing hearing, the trial court imposed a restitution fine of \$2,600 (§ 1202.4, subd. (b)), and an additional parole revocation restitution fine of \$2,600. (§ 1202.45.) The abstract of judgment, however, incorrectly reflects a parole revocation restitution fine of \$200. We will order the abstract of judgment corrected to conform to the judgment as pronounced by the trial court. (*People v. Boyde* (1988) 46 Cal.3d 212, 256.)

Conclusion

The clerk of the Superior Court is directed to prepare and forward to the Department of Corrections a corrected abstract of judgment reflecting a parole

revocation restitution fine of \$2,600, imposed and stayed pending successful completion of parole pursuant to section 1202.45. In all other respects, the judgment is affirmed.

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YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Bruce A. Clark, Judge
Superior Court County of Ventura

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